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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM ALLEN CARTER, Defendant and Appellant.	E047280 (Super.Ct.No. SWF022486) **OPINION**

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge. (Retired judge of the Mun. Ct. for the Central Orange Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Sarah A. Stockwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Peter Quon, Jr. and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

After police officers stopped the car that defendant William Allen Carter was driving, they found 1.5 grams of methamphetamine inside a panel in the dashboard. Defendant admitted that he was high on methamphetamine and that he used it every day. Defendant's roommate, however, testified that both the car and the methamphetamine belonged to her and that defendant did not know the methamphetamine was there.

A jury found defendant guilty of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). In a bifurcated trial, the trial court found true two prior drug-related conviction enhancements. (Health & Saf. Code, § 11370.2, subd. (b).) It also found true two 1-year prior prison term enhancements. (Pen. Code, § 667.5, subd. (b).) Defendant was sentenced to nine years in prison.

Defendant now contends:

1. The trial court erred by denying the jury's request for a readback.

2. The trial court erred by admitting evidence that defendant had committed a prior drug-related offense.

3. The sentence as pronounced by the trial court was contradictory.

We agree that the trial court erred by refusing to give the jury the requested readback, but we conclude that the error was harmless. We find no other error. Hence, we will affirm.

I

FACTUAL BACKGROUND

On August 3, 2007, Deputies Kenneth Lantz and Charlie Alkire were conducting the surveillance of a house on Gill Lane near Lake Elsinore. Between about 2:00 and 4:00 p.m., some two to five vehicles drove up to the house. Each vehicle would stop at the gate, wait until a person from the house came out and opened the gate, drive in, stay for 10 to 15 minutes, and then drive away.

Around 4:00 p.m., a black Kia Sorento drove up to the house and went through the same routine. When it left, the deputies followed it. After it made a left turn without signaling, they stopped it. Defendant was the driver and sole occupant. He appeared to be "amped up" -- nervous, fidgety, shaking, and stuttering.

With defendant's consent, Deputy Alkire searched the car. To the left of steering wheel, in the dashboard, there was a covered control panel. According to Deputy Alkire, the cover was "loose" and not flush with the dashboard. When he "flick[ed]" it with his fingernail, it "popped" open.

Inside, there was a baggie containing 1.5 grams of methamphetamine. This was about 15 doses. The baggie "was tied in a very tight knot with the stuff packaged tightly in that little end." The texture of the dashboard made it impossible to obtain usable fingerprints from it.

At the police station, Deputy Lantz performed a drug evaluation and determined that defendant was under the influence of a stimulant drug. When asked if he had used

methamphetamine, defendant said, "Yes." He added, "I used today. Every day. I am under the influence."

A urine sample taken from defendant showed high levels of methamphetamine and amphetamine.

In December 2007, officers searched the house on Gill Lane. Inside, they found "[m]ultiple drug paraphernalia," including methamphetamine pipes with what appeared to be methamphetamine residue. They also found a video monitoring system with the camera trained on the front gate.

The Kia was not registered to defendant. Charrae Dowling-Smith, defendant's friend and roommate, testified that the Kia belonged to her and defendant had never used it before. She also testified that the compartment in the dashboard had to be pried open with a screwdriver.

Dowling-Smith testified that she bought the methamphetamine and put it in the control panel. She had used some of it in the morning of the day that defendant was arrested. She did not tell defendant it was there, because he would have thrown her out of the house. Dowling-Smith admitted that she had not told anybody that the methamphetamine was hers until immediately before trial.

As we will discuss in more detail in part III, *post*, there was evidence of an incident in 1997 in which defendant was found to be involved in a methamphetamine manufacturing operation.

II

REFUSAL OF THE JURY'S REQUEST FOR A READBACK

Defendant contends that the trial court erred by denying the jury's request for a readback.

A. *Additional Factual and Procedural Background.*

Sometime during its first day of deliberations, the jury sent out a note asking for (1) Deputy Alkire's "description of finding the hidden compartment in the car & his description of what he found and the condition of the material in the bag & the way the bag was tied — if at all"; and (2) Dowling-Smith's "description of the day Mr. Carter was arrested, as to if she used drugs that day & was it from the bag found."

The trial court responded in writing, "You have heard the evidence[.] Keep working."

The jury's written question and the trial court's written response are in the clerk's transcript. However, the clerk's minute orders do not reflect any such question or response; neither does the reporter's transcript. At least as far as the record shows, the trial court never discussed the question with counsel.

The next day, the jury returned a verdict.

B. *Analysis.*

Penal Code section 1138 (section 1138), as relevant here, provides: "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, . . . they must require the officer to conduct them into court. Upon being

brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

"[U]nder this section, 'the trial court must satisfy requests by the jury for the rereading of testimony.' [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1213.)

The People rely on the presumption that an official duty has been regularly performed. (Evid. Code, § 664.) They argue that, because "the record is silent," we must presume not only that the trial court contacted counsel, but also that counsel failed to object to the trial court's response. Had that happened, however, both the contact and the lack of objection should have been noted in the record. We have the clerk's minute order for the relevant date, and it fails to mention the jury's question at all.[1] We are required to presume that the record includes all matters material to deciding the issues raised. (Cal. Rules of Court, rule 8.163.) Thus, the very silence of the record suffices to overcome the official-duty presumption.

It follows that the trial court erred by failing to contact counsel and by failing to provide the jury with a readback.

This brings us to whether the error was prejudicial. "'[A] conviction will not be reversed for a violation of section 1138 unless prejudice is shown.' [Citation.]" (*People*

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[1] We are at a loss to understand how the clerk could possibly have failed to note the jury's question in her minute order for the day. She did duly file-stamp and initial the question itself. Thus, the omission appears to have been the result of a deliberate decision by her or by the trial judge.

v. Jenkins (2000) 22 Cal.4th 900, 1027.) The California Supreme Court has held that section 1138 "is not of constitutional dimension" (*People v. Cox* (2003) 30 Cal.4th 916, 968, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22); hence, the state-law harmless error standard applies: "Asserted error may be disregarded unless it is reasonably probable that a result more favorable to defendant would have occurred had the challenged portions of the testimony been reread. [Citation.]" (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1020; see also *U.S. v. Birges* (9th Cir. 1984) 723 F.2d 666, 671 [defendant failed to show that the trial court's denial of a readback, without consulting counsel, "was prejudicial to his defense" or "affected the outcome of the trial"].)

Here, the evidence against defendant was quite strong. The only even debatable question was whether he knew the methamphetamine was in the car. As to this, he had just been seen briefly visiting the house of an apparent drug seller, in the manner of an apparent drug buyer. Also, when he was stopped, he admitted that he had used methamphetamine and that he was under the influence. Forensic testing confirmed this.

Admittedly, there was some exculpatory evidence — Dowling-Smith's testimony that the methamphetamine was hers and that defendant did not know about it. The fact that it was hers, however, would not get defendant out from under a transportation charge if he *knew* it was there. To support her claim that he did *not* know, she testified that one of his conditions for letting her live with him was that she "wasn't allowed to have drugs," and that "if he knew [she] had drugs, he would have thr[own her] out of the

house." She also testified that she never saw defendant either using or under the influence of methamphetamine. All of this testimony, however, was severely undercut by defendant's own admission that he used methamphetamine "[e]very day."

Moreover, the jury did not ask to have *all* of Dowling-Smith's testimony read back. Rather, it asked specifically for her testimony "as to if she used drugs that day & was it from the bag found." All she had said on that point was:

"Q. And had you accessed and used that meth that morning — that alleged meth?

"A. Yes."

The jury also asked for Deputy Alkire's "description of finding the hidden compartment in the car & his description of what he found and the condition of the material in the bag & the way the bag was tied -- if at all." He testified that he flicked open the loose cover of the control panel and found the baggie inside. The baggie "was tied in a very tight knot . . . ." A photo of the baggie of methamphetamine was in evidence.

It is almost inconceivable that a readback of this testimony would have affected the jury's verdict. If anything, the jury might have concluded that Dowling-Smith was lying when she claimed to have used some of the methamphetamine that morning, because the baggie was tied in a very tight knot. Certainly the testimony that the jury asked to hear was not significantly exculpatory.

We therefore conclude that the trial court erred — indeed, it erred inexplicably and egregiously. Nevertheless, defendant cannot show that the error was prejudicial.

III

"PRIOR BAD ACTS" EVIDENCE

Defendant contends that the trial court erred by admitting evidence of a prior drug-related offense.

A. *Additional Factual and Procedural Background.*

In their trial brief, the People argued that defendant had several prior drug-related offenses that were admissible to show that he was aware of the nature of methamphetamine. These included an incident in which he had been found to be in possession of items used to manufacture methamphetamine. Defendant responded that all of these prior offenses were more prejudicial than probative under Evidence Code section 352. The trial court admitted evidence of the one prior possession-cum-manufacturing incident.

Accordingly, at trial, former Deputy Jeffrey Chebahtah testified that in September 1997 he entered a house and found "the workings of a meth lab" inside. When brought to the house, defendant admitted that the person who lived in the house had been manufacturing methamphetamine and that he (defendant) "had helped . . . clean it up." In Chebahtah's opinion, defendant had been involved in manufacturing methamphetamine. The jury was instructed that it could consider this evidence solely "for the limited purpose of deciding whether or not the defendant knew the nature or character of methamphetamine as a controlled substance . . . ." (Judicial Council of California Criminal Jury Instructions No. 375.)

B. *Analysis.*

"Generally, the prosecution may not use a defendant's prior criminal act as evidence of a disposition to commit a charged criminal act. (Evid. Code, § 1101, subd. (a).) But [such] evidence is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .) other than his or her disposition to commit such an act.' (Evid. Code, § 1101, subd. (b).)" (*People v. Davis* (2009) 46 Cal.4th 539, 602.)

"Because evidence of other crimes may be highly inflammatory, the admission of such evidence '"'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.'"' [Citation.] Under Evidence Code section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. [Citations.] 'We review for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352.' [Citation.]" (*People v. Davis, supra*, 46 Cal.4th at p. 602.)

Ordinarily, when a defendant is charged with a drug-related offense, evidence of a prior offense involving the same drug is admissible to show that the defendant had knowledge of the nature of the substance. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 47.) Defendant argues that, because he was not claiming that he did not know what methamphetamine was, "knowledge of what methamphetamine looked like was not an

issue . . . ." However, "a defendant's plea of not guilty puts in issue all the elements of the charged offense. [Citations.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 204.)

Defendant also argues that, in light of his admission that he had used methamphetamine on the day of his arrest, the evidence was cumulative. The jury, however, did not have to believe Deputy Lantz's testimony that defendant had made this damaging admission; defense counsel would have been free to argue that defendant would not have made it and that the officers must have been making it up. Under these circumstances, the prior offense was highly probative of defendant's knowledge of the nature of methamphetamine.

The evidence was not unduly prejudicial. It indicated that defendant was an aider and abettor rather than the main perpetrator; thus, it was not particularly inflammatory. Finally, the jury was instructed not to consider the evidence for any improper purpose.

We therefore conclude that the trial court did not abuse its discretion by admitting the evidence of the prior offense.

IV

"CONTRADICTORY" SENTENCING

Defendant contends that the sentence that the trial court pronounced was contradictory.

A. *Additional Factual and Procedural Background.*

The original information alleged that defendant had a 1999 prior conviction for selling, furnishing, or transporting a controlled substance. (Health & Saf. Code,

§ 11379.) This 1999 prior was alleged as both a prior drug-related conviction enhancement (Health & Saf. Code, § 11370.2, subd. (b)) and a one-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)).

Before trial, the information was amended so as to allege two additional prior convictions. First, a 1988 prior conviction for selling, furnishing, or transporting a controlled substance (Health & Saf. Code, § 11379) was alleged as a prior drug-related conviction enhancement (Health & Saf. Code, § 11370.2, subd. (b)). Second, a 1998 prior conviction for possession of a controlled substance (Health & Saf. Code, § 11377) was alleged as a one-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)).

At sentencing, the trial court sentenced defendant to three years (the midterm) on the transportation charge. Initially, it imposed but stayed a one-year prior prison term enhancement based on the 1999 prior.

The prosecutor, however, pointed out that there were actually two alleged prior convictions under Health and Safety Code section 11379 that were also alleged as enhancements under Health and Safety Code section 11370.2, subdivision (b).

The trial court indicated that it had been using the original information, and it had not seen the amended information. It added, "As a consequence of another information that I don't have a copy of, I may resentence."

The prosecutor then provided the court with a copy of the amended information. The trial court proceeded to sentence defendant to three years on each of the two priors

under Health and Safety Code section 11370.2, subdivision (b), for a total sentence of nine years.

Defense counsel asked the court to strike one or both of the priors under Penal Code section 1385. It declined to do so.

B. *Analysis.*

We find nothing contradictory or confusing about the trial court's sentence. At first, because it was looking at a superseded information, it believed that defendant had only one prior drug-related conviction. It also mistakenly believed that this had been alleged solely as a one-year prior prison term enhancement. It therefore imposed but stayed a one-year term.

Once the prosecutor pointed out its mistake, however, the trial court realized that defendant actually had two prior drug-related convictions and that these were alleged as three-year enhancements under Health and Safety Code section 11370.2, subdivision (b). It therefore imposed both enhancements.

Defendant argues that the trial court contradicted itself by initially staying the term (of one year) on the 1999 prior, but then imposing a term (of three years) on the same 1999 prior. In the meantime, however, the court had realized that defendant had a more serious criminal record, and moreover that the Legislature had provided for more serious punishment, than it originally thought. This was in no way inconsistent.

Defendant also focuses on the trial court's statement, earlier at the sentencing hearing, that a certain 1984 prior "has no impact on the Court's concern." Defendant

argues, because no 1984 prior was alleged, that the court must have been referring to the 1988 prior. He concludes that it was inconsistent for the trial court to say that this prior was not a concern and yet to impose a three-year sentence on it.

In our view, this is painting oranges red and trying to call them apples. Defendant did have a 1984 drug-related prior conviction. However, it was not alleged in the information. When the prosecutor mentioned it at sentencing, the trial court quite properly said that it was not concerned with it. But the court was still entitled to be concerned with — and to sentence defendant on — the 1988 prior.

We therefore conclude that defendant has not identified any sentencing error.

V

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.